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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 104

BANKERS POCAHONTAS COAL COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE.

(Opinion December 5, 1932, by Mr. Justice Stone.)

MOTIONS ON BEHALF OF PETITIONER FOR REVIEW OF APPLICATION OF MANDATE AND FOR RECALL OR MODIFICATION OF JUDGMENT AND MANDATE HEREIN.

(Judgment, December 5, 1932; Mandate, January 11, 1933.)

SUPPORTING MEMORANDUM AND APPENDIX.

CAMDEN R. MCATEE,
Attorney for Petitioner.

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MOTIONS ON BEHALF OF PETITIONER FOR REVIEW OF APPLICATION OF MANDATE AND FOR RECALL OR MODIFICATION OF JUDGMENT AND MANDATE HEREIN.

Petitioner, Bankers Pocahontas Coal Company, by its attorney, respectfully moves the Court for

Review of the application by the United States Board of Tax Appeals of the mandate herein, and

For any necessary recall or modification of its judgment or mandate, or both, as may appear necessary to do justice between the parties.

For Cause.

In support hereof petitioner respectfully would show:

Jurisdiction.

Said mandate issued in the present term, to wit, on January 11, 1933. (Appendix A-3.)

The Present Record.

In supplement to the original record, petitioner here presents (Appendix) (A-1) the opinion, (A-2) the judgment and (A-3) the mandate of this Court; (A-4) Board order reciting the mandate of the Circuit Court of Appeals, (A-5) petitioner's motion filed before the Board for entry of tax determination under the mandate, (A-6) petitioner's proposed determination, and (A-7) Board decision overruling petitioner's motion and proposed determination. The copies of the Board records are certified by its Clerk to be true and correct.

The Questions Here Presented.

Whether, it appearing this Court omitted the question in its opinion herein, the resulting general affirmance is intended to deny petitioner the benefit of the principles originally applied by the respondent Commissioner, and approved by this Court in *Murphy Oil Co.* v. *Burnet,* before decision of this instant case,

to wit: that bonus payments are capital returns which reduce subsequent depletion allowances. Petitioner does not attempt to question any point decided in the opinion of this Court herein, only contending it should justly have the benefit of said principles upon the facts of record.

The Material Facts.

The order granting certiorari as entered on October 10, 1932, provided:

> * * * "the case is assigned for argument immediately following Case No. 80, *Murphy Oil Co.* v. *Burnet,* Commissioner of Internal Revenue."

The petition for certiorari presented as a ground therefor (pp. 9, 26):

> "The Board and Court below erred (references to opinion of each):
>
> "4. In deciding that the excess amount of minimum payment received in any year from the grantee over the payment thereby made for coal actually mined within the year is not subject to any depletion allowance (R., pp. 49, 134)."
>
> "*Reason* 2. *An important question of federal taxation is decided in a way in direct conflict with a decision of another Circuit Court of Appeals.*
>
> "*Question:*
>
> "2(*b*). *Whether the excess amount of minimum payment received in any year from the grantee over the payment thereby made for coal actually mined within the year is subject to any depletion allowance.*"

Responsive to the opposition filed against said petition, petitioner stated (p. 10):

> "Respondent (Opposition, p. 15), entirely misconceived any alleged conflict of the present case with the *Murphy Oil Company* case, wherein the Circuit Court of Appeals held a cash bonus was subject to depletion allowances and reversed the Board rulings which the Court of Appeals herein has sustained. Petitioner Coal Company here received the minimum annual payment as a cash bonus to the extent that the operator could not mine coal equal to such payment, and upon this ground, affirmed by the lower Court (R., p. 132), that such excess cash payment is a bonus, not being a payment for coal actually mined, depletion on such bonus is herein denied (R., p. 49). That makes the present case identical with the *Murphy Oil* case in which certiorari has been allowed."

In the Murphy Oil Company Appeal (15 B. T. A. 1195) and herein (18 B. T. A. 901), the Board held bonus payments were gross income not subject to depletion on the ground that the Bureau regulations providing for depletion thereof were invalid. Upon cross petition to the Circuit Court of Appeals, Ninth Circuit, taken by respondent Commissioner in the *Murphy Oil Company* case, the Board was reversed and this Court, in affirming the Circuit Court of Appeals, says of the Commissioner's action under the original and amended regulations:

> * * * "the requirements of the amended regulation were satisfied by treating the whole bonus as a return of capital, and deducting from

> the depletion alowance on each barrel of the royalty oil the proportion of the capital investment already returned by the bonus. This is what the Commissioner did. * * * Stated in another way, the total amount of the bonus was deducted from petitioner's total capital investment in oil in the ground returnable by depletion allowances, with a corresponding reduction in the per barrel capital investment in the oil reserve. Thus the Commissioner treated the whole of the bonus as a return, in advance of abstraction of the oil, as a part of the petitioner's capital investment in the oil in the ground, with which it would part, in a technical legal sense, only upon abstraction. In consequence, the deduction for depletion allowed on royalties received in 1919 and 1920 was reduced; * * *
>
> "But the regulation does not require him (the Commissioner) to make estimates which are unreasonable, for where none can be made with reasonable accuracy the Commissioner cannot find that the 'sum of the bonus and royalties expected to be received' exceeds the capital investment. In that event the whole of the bonus will be treated, as in this case, as a return."

In this Bankers case, upon petitioner's petition for review, the Circuit Court of Appeals, Fourth Circuit, did not pass upon the bonus point, and its general affirmance of the Board placed its decision in conflict with the *Murphy Oil Company* case decided by the Ninth Circuit.

This Bankers case was argued in this Court immediately following the *Murphy Oil Company* case, and

was decided immediately after decision of that case on December 5, 1932, both opinions being by Mr. Justice Stone, who said in the opinion herein:

> "We granted certiorari on a petition which assails the judgment below on three grounds, which will be separately considered."

However, the opinion (Appendix A-1), entirely omits the point of depletable bonus, and thereby same is not decided of record. After said opinions, the two cases stand in conflict upon the point as they did after the decisions of the respective Circuit Court of Appeals and before they entered this Court.

A request for rehearing by petitioner was thereafter filed and denied.

The judgment of this Court (December 5, 1932; Appendix A-2), is that the Circuit Court of Appeals be affirmed.

Its mandate thereon (January 11, 1932; Appendix A-3) recites the judgment of the lower court, and that same is affirmed, and orders remand of the case, commanding:

> • • • "that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding."

From the Circuit Court of Appeals its mandate issued and was received by the Board of Tax Appeals. Whereupon the Board (January 13, 1933—Appendix A-4), ordered the parties to present recomputations only for the year 1924.

The recomputation tendered by respondent Commissioner for said year 1924, gave effect only to the

point reversed, and, being to that extent correct, is not herein material in its details and is omitted.

With tender of its recomputation for all the years, petitioner presented its motion that said recomputation be entered as a proper application and construction of the mandate under the principles of the *Murphy Oil Company* case as applicable thereto (Petitioner's motion, Appendix A-5) (Petitioner's recomputation, Appendix A-6).

Thereupon, the Board overruled and denied the motion and rejected the proposed recomputation of petitioner and entered its order redetermining the 1924 tax in the amount proposed by respondent Commissioner, and thereby followed said mandate as not ambiguous (May 19, 1933, Appendix A-7).

Wherefore, this motion is the result.

The Substance of the Record.

The redetermination proposed by petitioner rests entirely upon matters of record, and purposes a correction of the Board determination as justified by the principles of the *Murphy Oil Company* case.

From the findings of fact by the Board, the following material facts appear:

(*a*) Under the contracts of 1902 petitioner received in the subsequent years including those in controversy a fixed sum per ton of coal mined ($0.10 usually), and a further fixed sum—

> * * * "during the continuance of this lease, as a minimum rental or royalty, whether the quantity of coal mined shall produce that amount of royalty or not, but the lessees shall have the privilege of mining the next succeeding

year, free of royalty a sufficient amount of coal above the amount necessary to produce the minimum royalty for that year to reimburse themselves for the deficiency in the preceding year" (Record p. 41).

(*b*) Petitioner had on March 1, 1913, recoverable coal computable as 37,608,642 tons (R. p. 43) of a capital value of $1,353,911.11 (R. pp. 53, 128).

NOTE.—In case of a lessor with property leased on March 1, 1913, as herein the basic capital subject to depletion is the value on the basic date of the expected royalties (Reg. 45, 62, 65, 69; Article 204 (*d*)). Assuming bonus payments may be expected under the lease-contract, same and the expected royalties cannot be determined or expected with reasonable accuracy as together exceeding the invested capital or basic value, and the actual method of the *Murphy Oil Company* case is applicable, treating the bonus as a return of capital effecting a decrease of the subsequent depletion unit deduction.

(*c*) The tonnage mined and the receipts for 1913 and through 1919, appear whereby the existing capital value on January 1, 1920, is directly computable (R. p. 44).

(*d*) The tonnage mined, the receipts and the tonnage paid for is scheduled as to each lease, a typical schedule being (R. p. 44):

Year.	Tonnage mined.	Paid for.	Receipts.	Comment—Bonus.
1920	57,189	120,000	$12,000	$6,281.10
1921	54,660	120,000	12,000	6,534.00
1922	55,864	120,000	12,000	6,413.60
1923	51,422	120,000	12,000	6,847.80
1924	57,928	120,000	12,000	6,207.20
1925	68,804	120,000	12,000	5,119.60
1926	90,029	120,000	12,000	2,992.10

It appearing 120,000 tons were paid for at 10 cents per ton, or $12,000, and that, in 1920, 57,189 tons were mined, there remain 62,811 tons not extracted, or $6,281.10 as a bonus payment. The column, "Comment —Bonus," above, is here inserted as a statement of the bonus each year, and it is equally easy of computation in the other lease-schedules.

The Readjustment Sought and Its Effect.

Petitioner contends, the bonus being apparent each year, same is a return of capital used to reduce the invested capital and thereby the resulting depletion unit for the succeeding year or years. The effect does not disturb the total of taxable income derived from the property. An illustration is attached (Appendix B).

The readjustment sought is amendment of the judgment and mandate by adding thereto the following words or their substance:

> * * * "is affirmed, excepting as modification thereof is necessary to return to petitioner the minimum annual payments as capital and not as income to the extent they may exceed payments for coal mined in the year as decided in *Murphy Oil Company* v. *Burnet* by this Court."

Further reasons are given as argument in the annexed memorandum.

Respectfully,

CAMDEN R. MCATEE,
Attorney for Petitioner.

Supporting Memorandum.

ARGUMENT.

Procedure and Jurisdiction.

The mandate herein being that the lower court is "*affirmed*", said lower court is bound thereby.

> "The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided upon appeal for error apparent, or intermeddle with it, further than to settle so much as has been determined."
>
> *Sibbald* v. *United States*, 12 Pet. 488, 492, 9 L. Ed. 1167, 1169.

It follows in neither the Circuit Court of Appeals nor Board of Tax Appeals by any proceedings therein, could the previous determination of the Board be changed, and that appeal or other steps taken therein to return the case to the Supreme Court, under such circumstances, are superfluous.

The *Sibbald* opinion, *supra*, recognizes this in that therein this Court acted upon a petition and motion for issue of a revised mandate giving proper execution to the decree.

The *Sibbald* opinion, *supra*, is further authority for the proposition that a Court cannot reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered,

unless for clerical mistakes, or to reinstate a cause dismissed by mistake.

The judgment and mandate herein were entered in the present term.

In a long series of decisions beginning probably with *Himely* v. *Rose,* 5 Cranch 313, and as approved in *Illinois* v. *Illinois Cent. R. Co.,* 184 U. S. 77, 91; 46 L. Ed. 440, 447, it is held that none of the questions originally before the Court can be reheard or decided. The rule is succinctly stated in *Thompson* v. *Maxwell Land Grant Co.,* 168 U. S. 451, 456, 42 L. Ed. 539, as:

> "It is the settled law of this Court, as of others, that whatever has been decided upon one appeal or writ of error cannot be reexamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case."

Admitting these propositions, it remains that this Court may properly inquire into the execution of its mandate, for as said by Chief Justice Marshall in the argument of *Himely* v. *Rose, supra:*

> "Nothing is before this court but what is subsequent to the mandate."

and he begins his opinion, saying:

> "A decree having been formerly rendered in this cause, the Court is now to determine whether that decree has been executed according to its true intent and meaning."

The True Intent and Meaning.

The judgment and mandate flow from the opinion. The opinion herein sets up and considers three specific

grounds on which, it is said, certiorari was granted. But the third point set up and considered is not the point of bonus payments as affected by the Murphy Oil Company case, and upon the points set up and considered, the Murphy Oil case is not relevant.

Knowing in *Bramwell* v. *U. S. F. & G. Co.*, 269 U. S. 483, 489, 70 L. Ed. 368, 372, this Court has said:

> "It is a general rule of universal application that general expressions used in a court's opinion are to be taken in connection with the case under consideration."

we come naturally to the proposition in *Story* v. *Livingston*, 13 Pet. 358, 373, 10 L. Ed. 200, 207, that

> "The mandate is to be interpreted according to the subject matter to which it has been applied, and not in a manner to cause injustice."

The case under consideration, as stated in the opinion, not being inclusive of the *Murphy Oil Company* issue, it is reasonably submitted that a judgment and mandate effecting an affirmance in conflict with the *Murphy Oil Company* case was not intended.

In the case, *In re Burr*, 4 Cr. 469, 2 L. Ed. 684, an opinion of the Supreme Court is extensively discussed. First it is said:

> "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered" (p. 481).

That case, stated in the present opinion does not include the bonus payments. Next the *Burr* opinion proceeds:

> "The opinion of a single judge certainly weighs as nothing if opposed to that of the Supreme Court; but if he was one of the judges who assisted in framing that opinion, if while the impression under which it was framed was yet fresh in his mind, he delivered an opinion on the same testimony, not contradictory to that which had been given by all the judges together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be in some measure explanatory of the opinion itself."

There is no contradiction in the opinion herein of the opinion in the *Murphy Oil Company* case, until we come to the judgment and mandate, and that such contradiction is not intentional seems apparent. Without intentional contradiction the point contradicted herein is not foreclosed and correction of the judgment and mandate will sufficiently adjust the matter.

In *United States* v. *Mitchell,* 271 U. S. 9, 14, 70 L. Ed. 799, 802, it is said:

> "It is not to be thought that a question not raised by counsel or discussed in the opinion had been decided merely because it existed in the record and might have been raised and considered."

In *East Tennessee V. and G. R. Co.* v. *Interstate C. Com.,* 181 U. S. 1, 17, 45 L. Ed. 719, 725, concerning the construction to be given to its opinions, the Court says:

> "The language of the opinions which is relied upon must be read in connection with its con-

> text, and must be construed in the light of the issue which was in controversy in the cases and which was decided."

Conceding counsel attempted to raise the bonus issue herein, and this Court in granting certiorari inferentially recognized its existence, it yet remains the opinion omits the question, and is decisive that it is not *"the issue which was in controversy in the cases and which was decided"*, quoting from the *East Tennessee* case, *supra.*

In conclusion, reference is made to authorities in the motion before the Board (Appendix A-5), and particularly to *Mitchell* v. *United States,* 15 Pet. 52, 84; 10 L. Ed. 658, 670, wherein it is said:

> "The meaning of the mandate may be ascertained from the instrument itself; but the reasons which induced the Court to make it, are to be found in the evidence contained in the original record. The Court will now do what it did in the case of Sibbald (12 Pet. 483). It said:
>
> " 'To ascertain the true intention of the decree and mandate of this Court, the decree of the court below, and of this Court, and the petitioner's title, must be taken into consideration. In 10 Wheat. 431, this Court says: "The proceedings in the original suit are always before the Court, so far as to determine any new points between the parties".' "

The Bonus Payments.

The effect of the leases herein is to create a bonus payment, notwithstanding the receipts are termed rentals or royalties. A royalty is the retained inter-

est of the lessor received as revenue (*Ferguson* v. *Commissioner*, 45 F. (2) 573, 577), and this Court says same is measured by actual production (*Burnet* v. *Harmel*, 287 U. S. 103, 112). The payment herein in excess of payment for actual production is not a royalty within these definitions. It is not a rental for it may be entirely absorbed by production, in which case it is a royalty and not a rental, and, therefore, if not absorbed, it remains and is a mere premium or bonus.

Respectfully submitted,

CAMDEN R. MCATEE,
Attorney for Petitioner.

APPENDIX A-1.

SUPREME COURT OF THE UNITED STATES.

No. 104.

BANKERS POCAHONTAS COAL COMPANY

vs.

COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

Dec. 5, 1932.

Mr. Justice STONE delivered the opinion of the court.

Petitioner, in 1912, acquired West Virginia coal lands in fee and, by assignment from the prior owners, certain leases or contracts entered into by them with various coal operators, by which the latter acquired the right to enter upon and use the lands for the production of coal and coke for a specified period, in consideration of stipulated royalties for the coal and coke produced, including minimum royalty payments in each year. In determining petitioner's income and profits taxes for the years 1920 to 1926, the Commissioner of Internal Revenue treated the royalty payments, after deducting a depletion allowance of 3.6 cents per ton of coal mined, as taxable income of petitioner, and assessed a corresponding increase in the tax. On appeal this ruling of the Commissioner was sustained, both by the Board of Tax Appeals, 18 B. T. A. 901, and the Court of Appeals for the Fourth Circuit, 55 F. (2) 626. We granted certiorari, — U. S. —, on a petition which assails the judgment below on three grounds, which will be separately considered.

First. It is insisted that no part of the royalties is taxable income of petitioner. Petitioner rests this contention on what is stated to be a rule of law of West Virginia, that under coal leases, like those presently involved, the title to the coal, in place, passes to the lessee or operator immediately on execution of the lease. From this it is argued that the royalties received were but payments for capital assets acquired and sold by petitioner before the adoption of the Sixteenth Amendment, and that their taxation as income is not authorized either by the statute or by the Sixteenth Amendment, because not apportioned.

The question whether payments of bonus and royalties from the lessee to the lessor of an oil lease are income within the meaning of the revenue laws taxing income, or a return of capital as upon a sale of the oil, was recently before this Court in No. 26, *Burnet* v. *Harmel,* decided Nov. 7, 1932. Although it was contended there, as it is here, that by State law the title to the mineral content of the leased land passed to the lessee upon execution of the lease, it was held that this characterization of the transaction in the local law did not affect the conclusion that the payments were gross income subject to tax, after the deductions allowed by the taxing act. The considerations which led to the conclusion that bonus and royalties paid to the lessor of Texas oil lands are taxable income and not a conversion of capital, as upon a sale of capital assets, are equally applicable to West Virginia coal leases, whether the title to the coal passes to the lessee in place at the date of the lease, or only upon severance by the lease.

The applicable statutes thus construed and applied do not tax any part of petitioner's capital investment before March 1, 1913. Section 234 (*a*) (9) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, and regulations under it, require depletion allowances upon

bonus and royalty payments received by the lessor of mineral lands, sufficient to provide for a return in full of his invested capital. The provisions of that section, and the related Treasury Regulations have been continued with the later revenue acts, see No. 80, *Murphy Oil Co.* v. *Burnet*, decided this day. The fact that the depletion allowance under the Revenue Act of 1913 was more limited is not pertinent here. *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301.

Second. In a suit brought by the petitioner in the District Court for Northern West Virginia, *Bankers Pocahontas Coal Co.* v. *White*, Collector of Internal Revenue, with respect to taxes for the years 1914 to 1919, it was held that petitioner was entitled to a depletion allowance on royalties received from the leases involved in the present suit, of 5¢ per ton of coal mined. It is insisted that the decision in that case was *res adjudicata* of that issue, and that in fixing the depletion allowance of the present case at 3.6¢ per ton, the court below and the Board of Tax Appeals erroneously refused to follow the decision of the district court in the earlier case. With respect to this contention it is sufficient to say that the suit in the district court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not *res adjudicata* against the Commissioner or the United States. *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 430; *Sage* v. *United States*, 250 U. S. 33; see *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; compare *Union Trust Co.* v. *Wardell*, 258 U. S. 537.

Third. After the Board of Tax Appeals had filed its findings of fact and opinion, both respondent and petitioner submitted recomputations of the amount of the deficiency under the Board's report, as provided by Rule 50 of the Board's Rules of Practice. In petitioner's recomputation, the claim was made for the

first time that the minimum royalty payments stipulated by the leases had in some instances exceeded the amount of the per ton royalty which would have been payable on actual production, and it was asked that the depletion allowance be computed upon the basis of the actual payments made, instead of upon the number of tons extracted. Petitioner, at a hearing on the recomputation, tendered evidence in support of this claim. The Board rejected the evidence and denied petitioner's motion for a rehearing in order to present this contention. The court below upheld this action.

The Board is authorized to prescribe rules of practice and procedure for the conduct of proceedings before it. Section 601, Revenue Act of 1928, c. 852, 45 Stat. 791, 871, 872, amending Section 907 (*a*), Revenue Act of 1924, as amended; see *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. Rule 50 prescribes the procedure for computing the amount of the deficiency after the Board has heard and decided the issues raised and presented on the merits. In terms, it directs that the hearing on the computation which it authorizes is to be "confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no argument will be heard upon or consideration given to * * * any new issues". The Board has held that under the rule new issues may not be raised and urged on a hearing upon the computation *Great Northern Ry. Co.* v. *Commissioner*, 10 B. T. A. 1347, affirmed on other issues 40 F. (2d) 372. The rule was a proper exercise of the power of the Board to prescribe the practice in proceedings before it. See *O'Meara* v. *Commissioner*, 34 F. (2d) 390, 395; *Boggs & Buhl* v. *Commissioner*, 34 F. (2d) 859, 861; *Metropolitan Business College* v. *Blair*, 24 F. (2d) 176, 178; compare *Sooy* v. *Commissioner*, 40 F. (2d) 634.

The purpose of the tendered evidence was to bring the case within the ruling of the Court of Appeals for the Ninth Circuit affirmed in No. 80, *Murphy Oil Company* v. *Burnet, supra,* that bonus payments to the lessor of a mineral lease are to be treated as advanced payments of royalties and depletion allowed. This was a new issue. We need not consider the contention of the Government that it does not clearly appear either that the stipulated minimum payments exceeded the total per ton royalties upon the leases or that, even if they did, the excess of the minimum royalties over the royalties computed on actual production can, upon a proper construction of the leases, be treated as advance payment of the per ton royalties to accrue in future years. It is not shown that the evidence tendered was not available to the petitioner in ample time to present it before the Board had made and filed its findings of fact and opinion. Under the circumstances, we cannot say that the Board abused its discretion in denying a rehearing.

Affirmed.

APPENDIX A-2.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 104

BANKERS POCAHONTAS COAL COMPANY, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

This cause came on to be heard on the transcript of the record from the United States Circuit Court of

Appeals for the Fourth Circuit, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals, in this cause, be, and the same is hereby, affirmed; and that this cause be, and the same is hereby, remanded to the said Circuit Court of Appeals.

Per Mr. Justice STONE,
December 5, 1932.

APPENDIX A-3.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Fourth Circuit, in a cause between Bankers Pocahontas Coal Company, Petitioner, and Commissioner of Internal Revenue, Respondent, No. 3215, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 27th day of January, A. D. 1932, is in the following words, viz.:

"This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby, affirmed except as to the determination of the deficiencies of the corporation for the year 1924, and as to this year, this cause be, and the same is hereby, remanded to the United States Board of Tax

Appeals for further proceedings in accordance with the opinion of the Court filed herein.

January 27, 1932.

MORRIS A. SOPER,
U. S. Circuit Judge."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed.

And it is further ordered, That this cause be, and the same is hereby, remanded to the said Circuit Court of Appeals.

December 5, 1932.

You, therefore, are hereby commanded that such proceedings be had in such cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the eleventh day of January, in the year of our Lord one thousand nine hundred and thirty-three.

(Signed) CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court
of the United States.

[Endorsed:] File No. 36,801. Supreme Court of the United States, No. 104, October Term, 1932. Bankers Pocahontas Coal Company vs. Commissioner of Internal Revenue. Mandate.

APPENDIX A-4.

UNITED STATES BOARD OF TAX APPEALS.

WASHINGTON.

Docket No. 42664.

BANKERS POCAHONTAS COAL CO., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ORDER.

(Entered May 19, 1933)

The petitioner having prosecuted an appeal to the Circuit Court of Appeals for the Fourth Circuit from the decision of the Board in the above-entitled proceeding entered July 16, 1930, and that court having on January 13, 1933, issued a mandate directed to this Board, reading in part as follows:

> " * * * It is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby, affirmed except as to the determination of the deficiencies of the corporation for the year 1924, and as to this year, this cause be, and the same is hereby, remanded to the United States Board of Tax Appeals for further proceedings in accordance with the opinion of the Court filed herein. January 27, 1932."

It is hereby

Ordered that the parties litigant file with this Board, on or before March 1, 1933, recomputations of the deficiency for 1924 in accordance with the opinion of the Circuit Court of Appeals entered January 27, 1932, and the proceeding is hereby set down for hearing on the Day Calendar of March 1, 1933.

(Signed) CHAS. P. SMITH,
[SEAL.] *Member.*

APPENDIX A-5.

UNITED STATES BOARD OF TAX APPEALS.

Docket Nos. 14516, 14517, 42664.

BANKERS POCAHONTAS COAL COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petitioner's Motion for Entry of Tax Determination With Supporting Statement and Argument.

(Filed May 19, 1933. Denied May 19, 1933.)

Petitioner, Bankers Pocahontas Coal Company, moves the Board:

1. To redeter the tax deficiencies for the calendar years 1920 to 1926, inclusive, herein in controversy, pursuant to the principles of the recomputation herewith tendered by petitioner, and marked for reference Exhibit "A", and for said purposes,

(*a*) To hold that under said mandate upon the record herein, and pursuant to the principles of *Murphy*

Oil Co. v. *Burnet, Commissioner,* decided previous to these cases, petitioner is entitled (1) to exclude in the several years from gross income the amounts therein received, purporting to be payments for tonnage of coal to be mined, but being in fact payments of bonus because said tonnage was not mined and the lessee lost the right to mine said tonnage under the contract therefor with petitioner, and (2) to use said payment as a credit of capital returned upon the basic content value of March 1, 1913, with a consequent recomputation and reduction of the depletion unit thereafter allowable, and for said purposes to state the capital tonnage content on March 1, 1913, to be 37,608,642 tons and the basic content value thereof to be $1,353,911.11 as determined of the record from stipulations of the parties.

(*b*) And for such other relief as may appear just and proper as incident to a true determination of the liability for tax deficiencies.

In support of said motion, petitioner by its attorney, respectfully would show the Board:

The Nature of the Controversy.

In *Murphy Oil Co.* v. *Commissioner,* 15 B. T. A. 1195, and *Bankers Pocahontas Coal Co.,* 18 B. T. A. 901, this Board held bonus royalties were non-depletable gross income upon authority of *Nelson Land & Oil Co.* v. *Commissioner,* 3 B. T. A. 315, decided upon the grounds that bonus payments by a lessee to a lessor constitute taxable income, and the Treasury Regulation that said bonus receipts were a return of capital was consequently invalid.

Upon cross-petition for review taken by respondent Commissioner to the Circuit Court of Appeals, Ninth Circuit, said Board decision in the Murphy Oil Company case was specifically reversed (55 Fed. (2) 17),

and upon petition for review by this petitioner to the Circuit Court of Appeals, Fourth Circuit, said Board decision in this Bankers Pocahontas Coal Company case was generally affirmed with no reference to the point (55 Fed. (2) 626).

The Supreme Court of the United States, having granted certiorari to the petitioners in each case, said herein (Record p. 187) in its order thereon:

> "The case (*Bankers Pocahontas Coal Co.* v. *Commissioner*) is assigned for argument immediately following Case No. 80, *Murphy Oil Co.* v. *Burnet, Commissioner of Internal Revenue.*" (Parentheses inserted.)

Both cases were argued on the same day and decided on the same day (Mr. Justice Stone writing). In the Murphy Oil case, decided first, the Circuit Court of Appeals was affirmed specifically, and the Treasury Regulation was approved. In the Bankers Pocahontas Coal case, three definite points were decided, none of which included said point decided in the Murphy Oil case, and the respective Circuit Court of Appeals was affirmed. Thus, the Murphy and Bankers cases apparently stand in conflict after their decision by the Supreme Court just as they did after decision by the Circuit Courts of Appeals, unless the mandate in the Bankers case is not inclusive of and decisive of the point concerning bonus payments specifically decided otherwise in the affirmance of the Murphy Oil case.

The Facts Herein as to Bonus and Basis Tonnage Content and Value.

Petitioner herein contested deficiency letters, holding it was a lessor and not a vendor of coal in place

under the laws of West Virginia, and allowing the statutory deduction as to a depletion unit of 3.6 cents per ton as derived from a valuation of 14,000,000 tons of recoverable coal existing on March 1, 1913, and having a capital value on that date of $510,000. By stipulated agreement of the parties it appeared the recoverable coal was 37,608,642 tons (Record, p. 43), whereby the value is $1,353,911.11 (Record, p. 53) as the return thereof at 3.6 cents per ton. These revised figures are properly to be substituted for the original figures in further consideration of the case.

The deficiency letters for 1924, 1925 and 1926 (Record, pp. 31, 33, 35) proposed depletion allowances upon coal paid for at separate depletion units computed as to each separate contract, and being somewhat less than 3.6 cents per ton, making the following explanation (Record, p. 31):

> Based on the terms of the leases in effect on March 1, 1913, the recoverable tonnages and productions, the following computations of values are in conformity with the regulations and are used instead of the $0.36 originally allowed.

This variance of depletion rate was substantially waived by a stipulation of parties that respondent allowed a depletion of $0.36 per ton (Record, p. 102).

The previous deficiency letters for 1920 to 1923, inclusive, (Record, pp. 12, 23) do not show the detail of depletion allowances, or the coal mined or paid for. The stipulated tonnages mined or paid for (Record, pp. 43-46) show some variations from the figures used in the deficiency letters for 1924-26.

Petitioner contested the deficiency letters before the Board only upon two grounds, (*a*) that its receipts constituted non-taxable income as the proceeds subsequently collected of sale-in-place contracts effected before the Amendment (Record, p. 7), and (*b*) if taxable income, that a greater depletion rate had been established in prior liquidation and should be used (Record, p. 8). Since depletion upon coal paid for was allowed in the letters, as stated above, and respondent Commissioner did not by affirmative answer seek to change the basis, depletion upon *coal mined* as distinguished *from coal paid for* was not in controversy. Details as to other points contested are here omitted as immaterial.

The evidence offered and Board findings thereon show its lessees paid petitioner (Record, p. 41) certain sums annually.

> * * * "as a minimum rental or royalty for the property herein demised, whether the quantity of coal mined shall produce that amount of royalty or not, but the Lessees shall have the privilege of mining the next succeeding year, free of royalty, a sufficient amount of coal above the amount necessary to produce the minimum royalty for that year to reimburse themselves for the deficiencies in the preceding year."

with the tonnage mined, the tonnage paid for, and the royalty receipts under each lease for the several years from 1913 to 1926 inclusive, and thereby that petitioner received bonus payments in substantial excess of payments for coal mined in the years in controversy (Particularly Leases No. 2 and No. 4, Record, pp. 44, 45),

which excess amounts petitioner claims are capital returns applicable in reduction of basic capital content with consequent readjustment of the depletion unit allowable for the ensuing year under the Murphy Oil case, and are not gross income not subject to depletion as previously held by the Board.

Although petitioner and respondent Commissioner were only in disagreement upon the two issues of whether the income was taxable at all or was subject to the larger depletion unit applied in previous litigation, the Board interjected and decided a third issue that bonus was gross income but not depletable whereby depletion was allowed only upon coal mined. The Board ruling that bonus is gross income not depletable is reversed by the Murphy Oil decision, and its application will properly dispose of the bonus payments in the present redetermination.

ARGUMENT.

The Existence of the Bonus Herein.

The equity of a lessor subject to depletion when leased on March 1, 1913, for the entire operating life of the property is the value on the basic date of "royalties and other payments to be expected under the terms of the lease in effect on that date" (Reg. 45, 62, 65, 69) (Art. 204(d)). The instant lease (quoted supra) deals with royalties and other payments, in that the minimum royalty is forfeit if equivalent coal is not mined.

A royalty is the retained interest of the lessor received as revenue (*Ferguson* v. *Commissioner*, 45 F. (8) 573, 577) and is measured by actual production (*Burnet* v. *Harmel*, 287 U. S. 103, 112). Hence the minimum not applied to coal mined is a bonus or premium.

The Mandate Does Not Exclude the Adjustment Sought.

The question here is not decided in the opinion of the Court.

In *Bramwell* v. *U. S. F. & G. Co.*, 269 U. S. 483, 489; 70 L. Ed. 368, 372, the Court says:

> "It is a rule of universal application that general expressions used in a court's opinion are to be taken in connection with the case under consideration."

Herein, the opinion says:

> "We granted certiorari on a petition which assails the judgment below on three grounds which will be separately considered."

But the petition for certiorari presented the bonus payments as governed by the Murphy Oil decision of the Circuit Court of Appeals, and did not present the third ground—the admissibility of evidence—considered and decided by the Supreme Court. It follows the bonus point, for consideration of which the case was probably originally advanced, is not passed on in the opinion, and it is not reasonably to be concluded the Supreme Court thereby purposed to deny herein the benefits of its affirmance of the Murphy Oil decision.

In *East Tennessee V. and G. R. Co.* v. *Interstate C. Com.*, 181 U. S. 1, 17, 45 L. Ed. 719, 725, concerning the construction to be given to its opinions, the Court says:

> "The language of the opinions which is relied upon must be read in connection with its context,

> and must be construed in the light of the issue which was in controversy in the cases and which was decided."

In *United States* v. *Mitchell,* 271 U. S. 9, 14, 70 L. Ed. 799, 802, it is said:

> "It is not to be thought that a question not raised by counsel or discussed in the opinion has been decided merely because it existed in the record and might have been raised and considered."

Application of the principles approved in the Murphy Oil case produces a reduction of the depletable capital content and a resulting smaller depletion unit. The rehearing applied for and denied by the Supreme Court does not address itself directly to the present question, it is submitted in overruling same, the Supreme Court has not foreclosed the point.

A Mandate is Subject to Construction.

In *Story* v. *Livingston,* 13 Pet. 358, 373, 10 L. Ed. 200, 207, we read:

> "The mandate is to be interpreted according to the subject matter to which it has been applied, and not in a manner to cause injustice."

In *West* v. *Brashear,* 14 Pet. 51, 54, 10 L. Ed. 350, 351, it is said:

> There has been some discussion at the bar as to the principles by which a circuit court of the United States is to be governed when executing a mandate from the Supreme Court. Undoubtedly the mandate must be its guide. It is the judgment of this Court transmitted to the Cir-

> cuit Court. And when the direction in the mandate is precise and unambiguous, it is the duty of the Circuit Court to carry it into execution, and not to look elsewhere for an authority to change its meaning. But, when as in this case, the Circuit Courts are referred to testimony to ascertain the amount to be decreed, and are authorized to take new evidence on the point, it may sometimes happen that there will be some uncertainty and ambiguity in the mandate; and in such a case, the Courts below have unquestionably the right to resort to the opinion delivered at the time in order to assist them in expounding it.

In *Board of Supervisors* v. *Kennicott,* 4 Otto 498, 24 L. Ed. 260, the mandate on the former appeal remanded the case "with directions to award a new trial," and that "further proceedings be had in conformity to the opinion and decree of this Court." After saying that technically there was no "new trial in equity," the Court proceeds:

> * * * "as our mandates are to be interpreted according to the subject matter of the proceedings here, and, if possible, so as not to cause injustice (*Story* v. *Livingston*) it is proper to inquire what must have been intended by the use of that term (new trial) in the decree, since it cannot have its ordinary meaning. For that purpose, we held, in *West* v. *Brashear,* that resort might be had to the opinion delivered at the time of the decree. * * * Under these circumstances, it is apparent that the words 'new trial' were used to convey the idea of such further action as should be found necessary to carry into effect what had already been decided."

In *Mitchel* v. *United States,* 15 Pet. 52, 84; 10 L. Ed. 658, 670, wherein it is said:

> "The meaning of the mandate may be ascertained from the instrument itself; but the reasons which induced the Court to make it, are to be found in the evidence contained in the original record. The Court will now do what it did in the case of *Sibbald* (12 Pet. 493). It said:
>
> " 'To ascertain the true intention of the decree and mandate of this Court, the decree of the Court below, and of this Court, and the petitioner's title, must be taken into consideration. In 10 Wheat. 431, this Court says: "The proceedings in the original suit are always before the Court, so far as to determine any new points between the parties." ' "

Respectfully submitted,

(S.) CAMDEN R. MCATEE,
Attorney for Petitioner.

APPENDIX A-6.

UNITED STATES BOARD OF TAX APPEALS.

Docket Nos. 14516, 14517, 42664.

BANKERS POCAHONTAS COAL COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

EXHIBIT A.

Petitioner's Recomputation Proposal.

(Filed May 19, 1933. Denied May 19, 1933.)

Petitioner, Bankers Pocahontas Coal Company, herewith presents and moves for entry as a proper execution of the mandate herein of the following:

Plaintiff's Redetermination of Tax.

	Existing deficiency.	Herein.	Overassessment.
1920	$5,202.27	$493.30	$4,708.97
1921	7,849.75	None	7,849.75
1922	4,150.08	None	4,150.08
1923	4,102.78	34.24	4,068.54
1924	3,677.23	None	3,677.23
1925	6,855.09	3,795.36	3,059.73
1926	7,333.85	4,945.41	2,388.44

Supporting and Explanatory Schedules.

In the foregoing, the only change from respondent's recomputation is the exclusion from gross and net income of the excess of coal paid for each year over coal mined each year. Said excess is treated as a return of capital in reduction of basic capital content with consequent recomputation of the resulting depletion unit. This is pursuant to principles as affirmed in *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299.

The figures used are derived from the record herein.

The net income for the several years is so revised as follows:

Year.	Board net income.		Less bonus.	Revised net income.
1920	$39,241.83	(1)	$24,416.20	$14,825.63
1921	47,067.66	(2)	42,261.64	4,806.02
1922	61,953.85	(3)	38,908.60	23,045.25
1923	58,569.32	(4)	33,520.80	25,048.52
1924	(8) 54,545.73	(5)	30,185.20	24,360.53
1925	52,731.44	(6)	25,840.40	26,891.04
1926	54,324.83	(7)	21,136.90	33,187.93

	(1) 1920		(2) 1921		(3) 1922	
	Tons.		Tons.		Tons.	
Lease 2	62,811	$6,281.10	65,340	$6,534.00	64,136	$6,413.60
3	.....	.....	1,712	119.84	.....	.....
4	13,082	1,308.20	74,852	7,485.20	.....	.....
	168,269	16,826.90	281,226	28,122.60	324,950	32,495.00
		$24,416.20		$42,261.64		$38,908.60

		(4) 1923.		(5) 1924.
Lease 2	68,587	$6,857.80	62,072	$6,207.20
Lease 4	266,630	26,663.00	239,780	23,978.00
		$33,520.80		$30,185.20

		(6) 1925.		(7) 1926.
Lease 2	51,196	$5,119.60	29,971	$2,997.10
Lease 4	207,208	20,720.80	181,398	18,139.80
		$25,840.40		$21,136.90

(8) Figure taken from respondent's present proposal.

	1920.		
Revised net income		$14,825.83	
Invested capital		$316,513.02	
Adjustments:			
Tax	$1,427.05		
Dividends	20,696.98		
		22,124.03	
		$294,288.99	
Deduction for Dividends:			
Available earnings		$14,825.83	
Tentative Tax		1,492.58	
(33.70)		13,333.25	
Dividend paid 3/31		7,500.00	
Earnings 90 days		3,033.00	
Paid from surplus		4,467.00	
Prorated 276 days			3,369.96
Dividend paid 5/10		22,500.00	
Earnings for 40 days		1,348.00	
Paid from surplus		21,152.00	
Prorated for 236 days			13,645.52
Dividend paid 6/30		9,000.00	
Earnings for 51 days		1,718.70	
		7,281.30	
Prorated 185 days			3,681.50
			20,696.98
Computation of tax:			
Excess profits tax			None
Balance		$14,825.83	
Exemption		2,000.00	
		12,825.83	$1,282.58
Previously assessed			789.28
Additional			$493.30

1921.

Revised net income		$4,806.02	
Plus depletion	$11,921.87		
Less revised depletion	10,312.61		
		1,609.26	
Taxable net income		6,415.28	
Profits tax		6,415.28	None
Balance		2,000.00	
		4,415.28	
10%			441.53
Previously assessed			698.95
Overassessment (barred)			257.42

1922.

Revised net income		$23,045.25	
Plus depletion	16,799.36		
Less revised depletion	16,112.46		
		686.90	
		23,732.15	
Tax 12½%			2,966.52
Previously assessed			3,594.13
Overassessment (barred)			627.61

1923.

Revised net income		25,048.52	
Plus depletion	17,090.60		
Less revised depl	16,118.04		
		972.56	
		26,021.08	
Tax 12½%			3,252.63
Previously assessed			3,218.39
Additional			34.24

1924.

Revised net income		$24,360.53	
Plus Depletion	20,553.41		
Less Revised Depl	18,498.07		
		2,055.34	
		26,415.87	
12½% tax			3,301.98
Previously assessed			7,235.40
Overassessment			3,933.42

1925.			
Revised net income		26,891.04	
Plus Depletion	18,851.47		
Less Revised Depl	16,547.40		
		2,304.07	
		29,195.11	
13% tax			3,795.36
1926.			
Revised net income		33,187.93	
Plus Depletion	22,547.56		
Less Rev. Depl	19,102.79		
		3,444.77	
		36,632.70	
Tax 13½%			4,945.41

Depletion Unit Recomputation.

		Base.	Reserves.	Rate.
March 1, 1913		1,353,911.11	37,608,642	.036
		93,741.50	2,881,708	
		1,260,169.61	34,726,934	.036
	16,423.02			
1920	24,416.20	40,839.23	456,195	
		1,219,330.38	34,270,739	.03505
	10,312.61			
1921	42,261.64	52,574.25	331,163	
		1,176,756.13	33,939,576	.0346
	16,112.46			
1922	38,908.60	55,021.06	465,649	
		1,121,735.07	33,473,927	.0338
	16,118.04			
1923	33,520.80	49,638.84	477,161	
		1,072,096.13	32,996,766	.0324
	18,498.07			
1924	30,185.20	48,683.27	570,928	
		1,023,412.86	32,325,838	.0316
	16,547.40			
1925	25,840.40	42,387.80	523,652	
		971,025.06	31,802,186	.0305
	19,102.79			
1926	21,136.90	40,239.69	626,321	
		930,785.37	31,175,865	

Respectfully submitted,

(s) CAMDEN R. MCATEE,
Attorney for Petitioner.

APPENDIX A-7.

UNITED STATES BOARD OF TAX APPEALS.

WASHINGTON.

Docket Nos. 14516, 14517, 42664.

BANKERS POCAHONTAS COAL CO., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

DECISION.

(Entered May 19, 1933.)

The Board by its order of January 18, 1933, ordered the parties litigant on a day certain to present recomputations of tax for the calendar year 1924, pursuant to mandate received therefor from the Circuit Court of Appeals for the Fourth Circuit (as affirmed by the Supreme Court of the United States), affirming the determination of the Board for the years 1920 to 1926, inclusive, excepting the year 1924. The day certain for presentation thereof was continued from time to time by the parties with the approval of the Board and final hearing was had thereon on May 17, 1933.

The respondent has filed a recomputation thereof for said year 1924, pursuant to the opinion of the Circuit Court of Appeals and the affirmance, showing a total tax of $6,818.21 instead of $7,235.40 as heretofore determined and that thereby an overassessment and overpayment of $417.19 in favor of petitioner were properly to be awarded.

The petitioner has filed its motion for entry of its recomputation filed as part thereof for all years adopt-

ing respondent's recomputation for 1924 of net income as required to be made by the Circuit Court of Appeals, but seeks further adjustment of net income for each year by excluding therefrom such part of minimum royalty payments received as exceed the payment therefrom for coal actually mined by the lessees as representing bonus payments. Petitioner contends that the alleged bonus payments constitute a return of capital with a consequent reduction of the depletion unit allowable in the succeeding year as authorized by the decision and opinion of the Supreme Court in *Murphy Oil Co.* v. *Burnet,* 53 S. Ct. 161, and that under the opinion of the Supreme Court herein said adjustment is a part of a reasonable and just execution of the mandate herein.

After argument by respective counsel the motion of petition is denied and said computation of the petitioner is rejected, it appearing that the mandate of the Circuit Court of Appeals herein is not ambiguous in its terms.

The premises considered, it is

Ordered and decided that there are deficiencies in tax due from the petitioner as follows:

1920	$5,202.27
1921	7,849.75
1922	4,150.08
1923	4,102.78
1925	6,855.09
1926	7,333.85

and that there is an overpayment for the year 1924 to be refunded in the amount of $417.19.

(Signed) CHAS. P. SMITH,
[SEAL.] *Member.*

Certification for United States Board of Tax Appeals, Washington, as to Documents, Appendix A-4-5-6-7.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, hereby certify the foregoing and attached to be true and correct copies of the petitioner's motion for entry of tax determination, with supporting statement and argument, petitioner's recomputation proposal, order dated January 18, 1933, and decision in Docket Number 42664, wherein Bankers Pocahontas Coal Company is Petitioner and the Commissioner of Internal Revenue is Respondent.

In testimony whereof I hereunto subscribe my name and affix the seal of said Board of Tax Appeals at the city of Washington in said District this 20th day of May, 1933.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

APPENDIX B.

Petitioner's method obtains the same taxable income from the property during its life as does the Board method, but with different allocations as in the several years.

For illustration assume a 4-year life; capital depletable value of $10,000, original coal content of 100,000 tons; original depletion rate of 10 cents per ton. Lessee is to pay $25,000 for 25,000 tons each year as a minimum payment under the same lease (quoted herein on pp. 7, 8), but mines respectively 20,000 tons the

first and second years; 25,000 tons the third year, and 35,000 tons the last year.

The Board computation of resulting net income:

Year.	Tons mined.	Tons paid.	(a) Depletion and (b) Capital return.		Non-depleted income.	De-pleted income.	Tax-able income.
(1)	20,000	25,000	(a)	$2,000	$5,000	$18,000	$23,000
			(b)	None			
(2)	20,000	25,000	(a)	2,000	5,000	18,000	23,000
				None			
(3)	25,000	25,000	(a)	2,500	.....	22,500	22,500
(4)	35,000	35,000	(a)	(3,500)	.....	31,500	31,500
		110,000		$10,000	$10,000	$90,000	$100,000

The petitioner's computation per Murphy Oil Co. Case:

Year.	Tons mined.	Tons paid.	(a) Depletion and (b) Capital return.		Non-depleted income.	De-pleted income.	Tax-able income.
(1)	20,000	$25,000	(a)	$2,000			
			(b)	5,000	.....	$18,000	$18,000
(2)	20,000	25,000	(a)	750			
			(b)	2,250	$2,750	19,250	22,000
(3)	25,000	25,000		.....	25,000	.....	25,000
(4)	35,000	35,000		.....	35,000	.....	35,000
	100,000	$110,000		$10,000	$60,750	$37,250	$100,000

The two schedules show the following:

In year 4, the lessee must pay a second time for $10,000 of coal paid for in years (1) and (2) because not mined within the contract time limit.

The Board treats the $10,000 as $5,000 of non-depletable income in year (1) and year (2) by reason of its prior decisions subsequently reversed by the *Murphy Oil case,* and allows depletion upon coal mined each year (item a).

Petitioner treats the $10,000 as a bonus capital return of $5,000 in year (1) and of $2,250 in year (2). Petitioner allows depletion upon coal mined each year but the capital return restores the basic capital in year (2). In other words, the Depletion and Capital

Return in year (1) is $7,000, after 20,000 tons are mined, whereby the remaining 80,000 tons are worth $3,000 or $0.0375 instead of 10 cents per ton. The Depletion in year (2) on 20,000 tons mined is $750, leaving $2,250 of capital value to be offset against the $5,000 of bonus capital return. This eliminates capital value and leaves $2,750 of said bonus as income because there is no capital value left. In years (3) and (4) the entire payments become non-depletable income subject to tax.

Under each computation the lessor receives $110,000, subject to a reduction of $10,000 of capital therein returned, and taxpays $100,000 during the life of the property.

Petitioner's method is that approved by *Murphy Oil Co.* v. *Burnet*, which rejects the other method.

Petitioner's method gives less taxable net income in the earlier years when higher tax rates prevail, and in this way lowers the tax for those years. It raises the tax in subsequent years by producing a larger taxable income.